IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. [redacted]14 14

EUGENE DENNIS,

Petitioner,

against

UNITED STATES OF AMERICA.

On Petition for Rehearing

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The undersigned, petitioners in *Barsky, et al.* v. *United States* wherein petition for rehearing from a denial of petition for writ of certiorari to the Court of Appeals for the District of Columbia is presently pending before this Court,* and respondents in *United States* v. *Fleischman*** and *United States* v. *Bryan**** which were argued before this Court on December 15, 1949, and have not to date been decided, respectfully request this Court for leave to file a brief as *amici curiae* in this case.

* October Term 1947, No. 766.
** October Term 1949, No. 98.
*** October Term 1949, No. 99.

Motion for Leave to File Brief as *Amici Curiae*

The interest of the movants in the petition for rehearing by Dennis is two-fold: each of the cases ultimately involves the constitutionality of the Congressional authorization for the House Committee on Un-American Activities; and in *Bryan* and *Fleischman*, as in *Dennis*, the question is raised as to the propriety of the presence of Government employees as jurors in prosecutions for contempt of the House Committee.*

The consent of the respondent in this case to the filing of a brief as *amici curiae* by the movants herein has been sought but not obtained, consequently the instant motion is made pursuant to paragraph 9(c) of Rule 27 of this Court.

I

The petition for rehearing herein did not raise the question of the constitutionality of the Congressional enactment pursuant to which the House Committee conducted and continues to conduct its investigations. If the instant motion is granted, the movants will present reasons why this Court should hear and pass upon that constitutional issue. To date the Court has refused to grant certiorari on the question of the constitutionality of the House Committee.** In the instant case the Court has not only denied certiorari on the question of the validity of the House

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* Even in the event this Court should affirm the decision by the Court of Appeals in the District of Columbia in *Bryan* (174 F. 2d 519) and *Fleischman* (174 F. 2d 525) without reaching the question raised as to the presence of Government employees on the jury, respondents in those cases are vitally affected by the decision of this Court in *Dennis* in that upon a new trial they will be confronted with the question of the inclusion of Government employees as jurors.

** *Josephson* v. *United States*, 333 U. S. 838; *Barsky* v. *United States*, 334 U. S. 843; *Dennis* v. *United States*, 337 U. S. 954; *Marshall* v. *United States*, 18 L. W. 3040; *Lawson* v. *United States*, *Trumbo* v. *United States*, 18 L. W. 3082; *Morford* v. *United States*, 18 L. W. 4235.

Committee but, in addition, it has affirmed a judgment of conviction which is ultimately predicated upon the power of the House Committee to compel testimony. Consequently, although this Court has frequently reiterated the admonition that the denial of a petition for writ of certiorari is not a determination on the merits (*Maryland* v. *Baltimore Radio Show*, 338 U. S. 912, 919; *House* v. *Mayo*, 324 U. S. 42; *Atlantic Coast Line R. Co.* v. *Powe*, 283 U. S. 401; *United States* v. *Carver*, 260 U. S. 482; see also, *Darr* v. *Burford*, 18 L. W. 4217, 4221), the affirmance of the judgment of conviction for the commission of an alleged contempt before the House Committee does tend to convince the Bench and the Bar—as the public has already been convinced—that this Court deems the House Committee to be constitutional. It is the contention of the movants that thus to adjudicate one of the most important and basic issues of civil liberties in our times is inconsistent with the obligation of this Court to state cogently the reasons for its decisions. Only by such statement can this Court discharge its responsibilities to the public and to the legal profession. Nor should adjudication on the constitutionality of the House Committee be further adjourned on the grounds that "the question had better await the perspective of time or that time would soon bury the question" (FRANKFURTER, *J.*, dissenting in *Darr* v. *Burford, supra,* at 4224), for the persistence of the excesses by the House Committee and other Congressional investigating committees and the political hysteria generated by the Committee gain momentum, not quiescence, from the silence of this Court. Written opinions are essential not only as an effective check upon the judiciary but also as a guide to the parties to the litigation, to the lower tribunals, and to the political processes which, when advice is given by the highest tribunal as to the constitutional scope of Congressional investigations, may then be used in an enlightened fashion to alleviate the conditions created by the House Committee and other similar agencies. If the instant motion is granted the movants

will argue to the Court the historical and pragmatic reasons why it should reduce its views on the constitutionality of the House Committee to an opinion, and movants will further indicate that although the writ of certiorari herein was limited to the question of the propriety of permitting Government employees to sit on the jury, this Court may nevertheless in the interests of justice rule upon the constitutional issues (see, *e.g.*, *Terminiello* v. *City of Chicago*, 337 U. S. 1; see also *Fischer* v. *United States*, 328 U. S. 463, 467; *Brashfield* v. *United States*, 272 U. S. 448, 450; *Weems* v. *United States*, 217 U. S. 349, 362; *Crawford* v. *United States*, 212 U. S. 183, 194; *Wiborg* v. *United States*, 163 U. S. 632, 638).

II

In the event that the instant motion should be granted, the movants would argue that the grounds for concurrence assigned by Mr. Justice Reed impose a burden of proof incapable of fulfillment.

Three members of the Court joined in the majority opinion in this case. Mr. Justice Jackson concurred indicating, however, that he would vote for the exclusion of Government employees as a class from the jury in all prosecutions for contempt of the House Committee whenever a majority of the Court reaches agreement with him on that proposition. Mr. Justice Black and Mr. Justice Frankfurter dissented and would reverse the conviction. Mr. Justice Douglas has recently indicated that he dissents from the majority view of the Court in this case (see *Morford* v. *United States*, 18 U. S. Law Week 4325). Mr. Justice Clark did not sit in the instant case. Consequently, in the pending prosecutions for contempt of the House Committee on Un-American Activities which may hereafter come before this Court, and in which Mr. Justice Clark

will probably not participate, this Court is evenly divided on principle as to the applicable rule of law.* In the circumstances it becomes peculiarly appropriate to analyze and consider with great care the position of Mr. Justice REED in this case, and if the instant motion is granted movants will argue and demonstrate to Mr. Justice REED that it is as futile to attempt to prove implied bias on the basis of "circumstances . . . properly brought to the Court's attention which convinces the Court that Government employees would not be suitable jurors in a particular case", as it is to prove actual bias on the part of prospective jurors. For the testimony of Government employees is the main, if not the only evidence (apart from that evidence already before the Court in *Dennis* by way of judicial notice), which could prove the implied bias of the class. The very reasons which make it virtually impossible to show that a Government employee who is a prospective juror may be excluded for actual bias also make it futile to attempt to prove implied bias of the entire class by evidence which must, of necessity, be comprised of the testimony of Government employees. If a Government employee who is a prospective juror may not be relied upon to express actual bias, then Government employees supply no source of evidence from which implied bias of the class can be proven. Consequently the test which Mr. Justice REED would impose is virtually impossible of practical compliance.

Moreover, movants would show to the Court and to Mr. Justice REED that the test suggested by him would allow for the exclusion of Government employees as a class in one prosecution for contempt of the House Committee and yet might permit Government employees as a class to sit in the next prosecution for contempt of the same Com-

* The effect of this division is to create great confusion for it may result in the affirmance of a conviction where the Court of Appeals has sustained a conviction and the affirmance of a reversal where the Court of Appeals has overturned a conviction.

mittee. Such an unequal result, predicated upon different versions of the same objective fact which is more properly the subject matter of judicial notice than that of adversary litigation, should not be encouraged. Accordingly, it has never been required to prove, except by way of deducing reasonable inferences from common experience ascertainable by judicial notice, implied bias of a class; indeed, the doctrine of implied bias assumes the inability to prove bias directly. The novel rule proposed by Mr. Justice Reed should be reconsidered.

CONCLUSION

It is respectfully submitted that the motion be granted and that the movants herein be granted leave to file briefs as *amici curiae* upon the petition for rehearing.

Respectfully submitted,

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